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**IN THE
COURT OF APPEALS OF INDIANA**

JUAN LIZARAGGA,)

Appellant-Defendant,)

vs.)

STATE OF INDIANA,)

Appellee-Plaintiff.)

No. 49A02-0706-CR-526

APPEAL FROM THE MARION SUPERIOR COURT
CRIMINAL DIVISION, ROOM 7
The Honorable Stanley Kroh, Commissioner
The Honorable William J. Nelson, Judge
Cause No. 49F07-0003-CM-42168

November 30, 2007

MEMORANDUM DECISION – NOT FOR PUBLICATION

RILEY, Judge

STATEMENT OF THE CASE

Appellant-Defendant, Juan Lizarraga (Lizarraga),¹ appeals the trial court's revocation of his probation.

We affirm.

ISSUES

Lizarraga presents three issues on appeal, which we restate as follows:

(1) Whether the trial court erred when it conducted a plea hearing and accepted his admissions prior to questioning him on his rights;

(2) Whether the trial court erred when it found he had willfully failed to pay designated fees; and

(3) Whether the trial court abused its discretion when sentencing him for his probation violation.

FACTS AND PROCEDURAL HISTORY

On August 24, 2000, Lizarraga pled guilty to operating a vehicle while intoxicated, a Class A misdemeanor, Ind. Code § 9-30-5-2. He was sentenced to three hundred sixty-five days in jail with three hundred sixty-three of those days suspended, and one hundred eighty days of probation. Additionally, Lizarraga was fined thirty-five dollars and assessed fees and costs related to his conviction, was ordered to complete community service hours, take a substance abuse counseling class, and attend a Mothers Against Drunk Driving Victim

¹ The State spells the Appellant-Defendant's last name "Lizarraga" (see Appellee's Brief), while the Appellant-Defendant spells his last name "Lizaragga." (See Appellant's Br.). Since the trial court has used

Impact Panel.

On February 26, 2001, the State filed a Notice of Probation Violation alleging:

Lizarraga has failed to complete his substance abuse treatment program.[] Lizarraga has failed to provide verification of his Community Work Service hours.[] Lizarraga has failed to make a good faith effort in making payments towards his [c]ourt ordered financial obligations.[] Lizarraga has failed to report to the Probation Department as scheduled.[] Lizarraga has failed to provide the Probation Department with a current address.

(Appellant's App. p. 15). The trial court issued a warrant for Lizarraga's arrest.

On May 22, 2007, Lizarraga voluntarily surrendered himself to Marion County Superior Court 11 (Court 11). Court 11, without the assistance of an interpreter, advised Lizarraga of his rights, and appointed him a public defender because he could not afford to hire his own. Thereafter, Court 11 ordered Lizarraga to be held without bond until May 25, 2007, when the trial court could hold a hearing on the probation violation.

On May 25, 2007, the trial court held a hearing on the probation violation in the presence of an interpreter. After Lizarraga was sworn, his counsel began questioning him on the truth of the allegations in the Notice of Probation Violation, and Lizarraga admitted to each of the allegations. Thereafter, the trial court asked Lizarraga if he had an explanation as to why he failed to comply with the terms of probation. Lizarraga replied:

I was in compliance with everything[,] but when I had to pay to the [c]ourt eight hundred dollars[] I didn't have the money because I wasn't working. I would like to say the truth that I was afraid. I know that it was the wrong thing to do and because of those reasons I just stop doing the rest of it and since that time I have become a different person.

the spelling "Lizarraga" in its Order on Probation Violation Hearing, we choose to follow that spelling. (Appellant's App. p. 13).

(Appellant's App. p. 26). Lizarraga also admitted that he had been working for approximately the past five years at Charlie's Restaurant, and affirmed that he has a wife and two children.

Following Lizarraga's admissions, the trial court informed him of his right to a contested hearing on the allegations, his right to cross-examine witnesses, his right to remain silent, and his right to subpoena witnesses. The trial court then asked if he understood that by admitting the allegations, that he had waived those rights; to which Lizarraga replied affirmatively after a brief colloquy explaining the waiver in more detail.

Proceeding to sentence Lizarraga, the trial court then explained that it was influenced by the facts that Lizarraga was working and apparently had the means to pay his obligations but paid nothing, "but more importantly he did not report to probation as directed and failed to complete his substance abuse program." (Appellant's App. p. 29). Thereafter, the trial court revoked Lizarraga's probation and ordered him to serve one hundred fifty days in the Marion County Jail. Additionally, the trial court entered a civil judgment for the unpaid balance of eight hundred twenty dollars.

Lizarraga now appeals. Additional facts will be provided as necessary.

DISCUSSION AND DECISION

I. Waiver of Contested Probation Hearing

Lizarraga argues that the trial court erred when it accepted his admissions on the State's allegations prior to advising him of his rights and determining that he had waived those rights. We disagree.

First, we acknowledge that a probation revocation hearing is in the nature of a civil proceeding; therefore, the State need only prove a violation by a preponderance of the evidence. I.C. § 35-38-2-3(e); see also *Washington v. State*, 758 N.E.2d 1014, 1017 (Ind. Ct. App. 2001). We will not reweigh the evidence nor judge the credibility of the witnesses. *Id.* Rather, we look to the evidence most favorable to the State and affirm the revocation if substantial evidence of probative value supports the trial court's decision. *Id.* The grant of probation or conditional release is a favor granted by the State, not a right to which a criminal defendant is entitled. *Sanders v. State*, 825 N.E.2d 952, 955 (Ind. Ct. App. 2005), *trans. denied*. However, because probation revocation implicates the defendant's liberty interests, he is entitled to some procedural due process before the State can revoke that favor. *Id.*

In a probation revocation proceeding, the minimum requirements of due process include: (a) written notice of the claimed violations of probation; (b) disclosure to the probationer of evidence against him; (c) opportunity to be heard in person and to present witnesses and documentary evidence; (d) the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation); (e) a neutral and detached hearing body; and (f) a written statement by the factfinder as to the evidence relied on and reasons for revoking probation.

Gosha v. State, 873 N.E.2d 660, 663 (Ind. Ct. App. 2007). These specific due process rights are codified at I.C. § 35-38-2-3 and stem from the Supreme Court's pronouncement in *Morrissey v. Brewer*, 408 U.S. 471 (1972).

In *Parker v. State*, 676 N.E.2d 1083 (Ind. Ct. App. 1997), we addressed a situation where, at the beginning of a probation revocation hearing, Parker's attorney informed the trial court that Parker was going to admit to the probation violations. *Id.* at 1085. Parker argued on appeal that his due process rights were violated because no evidence was presented

to support the revocation of his probation. *Id.* However, the *Parker* court explained that a probation revocation hearing is a civil proceeding, as opposed to a criminal proceeding. *Id.* Thus, the *Parker* court concluded that a probationer is bound to the actions of his attorney, just as any civil litigant is. *Id.* at 1086.

In the situation here, Lizarraga complains that he was not informed of his rights until after his attorney had already elicited admissions of the probation violations from him. In accordance with *Parker*, we conclude that any complaint Lizarraga may have due to the sequence of his admissions and the following explanation of his rights by the trial court are owed to the actions of his attorney, and he is bound to those actions. *See id.*

II. *Failure to Pay*

Lizarraga contends that the trial court committed reversible error when it revoked his probation relying on his failure to pay assessed costs and fees. Specifically, he argues that the trial court did not conduct an appropriate inquiry into his ability to pay prior to finding that his failure to pay was willful.

“Probation may not be revoked for failure to comply with conditions of a sentence that imposes financial obligations on the person unless the person recklessly, knowingly, or intentionally fails to pay.” I.C. § 35-38-2-3(f). In explaining this statute when reviewing the revocation of probation for failure to pay restitution, we previously stated, “before incarcerating a probationer for failure to make restitution, the [trial c]ourt must inquire into the reasons for the failure to make the required payments. *Barnes v. State*, 676 N.E.2d 764, 765 (Ind. Ct. App. 1997). If the trial court finds that a probationer has willfully refused to

make restitution or has failed to make sufficient *bona fide* efforts to pay, his probation can be revoked. *Id.*

However, if the trial court finds that the probationer is unable to pay despite sufficient *bona fide* efforts, the trial court must consider the imposition of alternative means of punishment rather than imprisonment. To imprison a probationer who is unable to comply with the financial conditions of his probation through no fault of his own without considering alternative means of punishment violates the fundamental fairness required by the Fourteenth Amendment.

Id. (citing *Bearden v. Georgia*, 461 U.S. 660, 672-73 (1983)) (internal citation omitted).

Here, we find the trial court relied solely upon Lizarraga's admission that he had had a job for the past five years to conclude that he "apparently had the means to pay his obligations." (Appellant's App. p. 29). However, the record reflects that the trial court made no inquiry as to how many hours per week Lizarraga worked, that his rate of pay has been, what property he owns, whether he is the sole income provider for his family, or what financial obligations he pays to support himself and his family. The only evidence available to the trial court which speaks of Lizarraga's ability to pay his assessed fees and fine, aside from his own statement that he has been employed, was his statement that he was initially unable to pay the fees and fine, and that he had been appointed counsel to represent him during the probation revocation proceeding because of his indigent status. Accordingly, we conclude that the trial court's determination that Lizarraga had the means to pay his probation fees and fine was not supported by substantial evidence of probative value.

Nevertheless, we find that the trial court relied primarily on Lizarraga's other

probation violations to revoke his probation. As the trial court explained, “more importantly [Lizarraga] did not report to probation as directed and failed to complete his substance abuse treatment program and the [trial court] does find him in violation of probation based on his admissions to all of the allegations.” (Appellant’s App. p. 29). A trial court may revoke a person’s probation upon evidence of a violation of any single term of probation. *Washington*, 758 N.E.2d at 1017. Therefore, we conclude that the trial court’s error in determining that Lizarraga had the means to pay his probation fees and fine was harmless.

III. Sentence

Finally, Lizarraga argues that the trial court’s sentence for violating his probation is inappropriate when his character and the nature of his offense are considered, urging us to review his sentence under Ind. Appellate Rule 7(b). However, upon reviewing the relevant case law, we find that the appropriate standard of review of a trial court’s sentencing decision upon a probation revocation is to determine whether the trial court abused its discretion. *See Sanders*, 825 N.E.2d at 956-57. I.C. § 35-38-2-3 gives the trial court options upon finding a probationer has committed a violation of his probation. *Sanders*, 825 N.E.2d 957 (citing *Johnson v. State*, 692 N.E.2d 485, 488 (Ind. Ct. App. 1998)). The existence of these options in this statute implies that the trial court has discretion in deciding which option is appropriate under the circumstances of each case, which supports a review of the trial court’s decision for an abuse of discretion. *Id.*

Lizarraga was originally sentenced to three hundred sixty-five days, with three

hundred sixty-three days suspended. After revoking Lizarraga's probation, the trial court ordered Lizarraga to serve one hundred fifty days in the Marion County Jail, less than half his originally suspended sentence. The trial court could have ordered Lizarraga to serve the entirety of the sentence that was suspended at the time of the initial sentencing, but did not. *See* I.C. § 35-38-2-3(i)(2). Thus, we conclude that the trial court did not abuse its discretion by ordering Lizarraga to serve a one hundred fifty day sentence for violating the terms of his probation.

CONCLUSION

For the foregoing reasons, we conclude that: (1) the trial court did not err by receiving by receiving Lizarraga's admissions prior to informing him of his rights; (2) the trial court's error of finding Lizarraga had an ability to pay the fine and costs without probative evidence was harmless because the trial court relied upon other sufficient reasons to revoke Lizarraga's probation; and (3) the trial court did not abuse its discretion when it made its sentencing decision.

Affirmed.

FRIEDLANDER, J., and SHARPNACK, J., concur.